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M E M O R A N D U M

VIA COURIER

TO: **William F. Caton, Assistant Secretary**

FROM: **David A. Konuch**

DATE: **March 1, 2002**

RE: **Joint Comments of Cbeyond and NuVox Communications in CC Docket No. 01-337**

Enclosed please find an original and four copies of Joint Comments of Cbeyond and NuVox Communications in CC Docket No. 01-337.

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
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FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE (202) 955-9871
E-MAIL: dkonuch@kelleydrye.com

March 1, 2002

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket NO. 01-337**

Dear Mr. Caton:

Pursuant to the Commission's rules, enclosed please find an original and four copies of the Joint Comments of Cbeyond and NuVox in response to the Commission's Notice of Proposed Rulemaking in CC Docket No. 01-337, released December 20, 2001.

Should you have any questions at all, please call me at (202) 955-9871.

Sincerely,

David A. Konuch

Enclosures

DC01/KONUD/176323.1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Regulatory Requirements	)	
Incumbent LEC Broadband	)	**CC Docket No. 01-337**
Telecommunications Services	)	
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JOINT COMMENTS OF CBEYOND AND NUVOX

Jonathan E. Canis
Enrico C. Soriano
David A. Konuch
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

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SUMMARY

The Federal Communication Commission (the "Commission") has sought comment on the best way to spur broadband deployment, and specifically, on whether deregulation of Incumbent Local Exchange Carriers ("ILECs") will achieve this goal. As Cbeyond and NuVox's comments will show, a direct correlation exists between ILEC spending on capital improvements and the competitive threat to ILEC operations posed by competitive local exchange carrier ("CLECs"). Because this correlation exists, the best way to spur broadband deployment is to enforce rigorously the Commission's existing rules implementing the Telecommunications Act of 1996 ("the Act").[1]

Strong enforcement of the Commission's existing rules enables CLECs to obtain inputs, such as unbundled network elements ("UNEs"), that they need to provide broadband service in competition with ILECs. In contrast, any regulatory regime that would have the Commission abdicate its responsibilities and cease enforcing its rules will stop broadband deployment in its tracks.

ILECs still control the bottleneck inputs necessary for CLECs to provide broadband competition, and thus, still possess the market power and the means to make it difficult for CLECs to compete with them using these inputs. Existing law still requires ILECs to make these inputs available for use by their competitors. Wireline CLECs, such as the Joint Commenters, have invested billions of dollars in infrastructure and are fulfilling the Act's promise of competition. Yet, despite the progress these carriers have made, their competitive inroads are not yet so significant as to threaten ILEC dominance

[1] 47 U.S.C. § 151 *et seq.*

in the broadband services markets. In addition, intermodal competition to ILEC provision of broadband, especially in the small- to medium-sized business markets in which the Joint Commenters compete, barely exists today, and is no substitute for dominant carrier regulation of ILEC-provided broadband.

If the deregulatory regime proposed by the Commission were to become law, it would place CLECs at an unfair and illegal competitive disadvantage, thereby removing the one factor – the threat of competition from wireline CLECs — that *is* spurring broadband deployment today. Moreover, the Commission cannot rely on the "honor system" of deregulation, because ILECs have a long history of breaking their promises to regulators when it comes to deploying new and innovative technologies.

The Commission's proposal for increasing broadband deployment -- deregulation, is a solution in search of a problem. The record demonstrates that the ILECs invested in new facilities when the competitive threat from CLECs was at its zenith, and reduced their capital spending when the threat waned. It is this competitive threat that incents broadband deployment, and not the presence or absence of allegedly burdensome regulations that, in any event, are mandated by the Act.

Competition has repeatedly been demonstrated to be a more effective driver of new technologies than deregulation. As always, the problem with broadband delivery to end-users remains the last mile. All that is needed is for the Commission to enforce existing regulations to allow competitors access to UNEs that provide last mile connectivity. All we ask from the Commission is that it do its job as referee and enforce the laws Congress wrote to ensure a fair fight.

We also anticipate the ILECs will use this proceeding to try to make an end-run around Congress to implement Tauzin-Dingell. The FCC must not permit the ILECs to use this proceeding to circumvent the legislative process.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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JOINT COMMENTS OF CBEYOND AND NUVOX

Cbeyond Communications, and NuVox (collectively, "the Joint Commenters"), through their attorneys, hereby file these comments in response to the Commission's *NPRM*[2] urging the Commission to recognize that ILECs are dominant carriers in the provision of broadband services, and that the law and public interest demands that the Commission continue to impose dominant carrier regulation on ILECs in their provision of broadband services.

The following is a brief overview of Cbeyond and NuVox:

- **Cbeyond.** Cbeyond is one of a new breed of service providers that provides an integrated package of IP-based local and long-distance services, always on Internet connectivity, as well as other high-speed data and IP-based applications. A privately held Atlanta-based company, Cbeyond is among the first service carriers to build, from the ground up, an integrated, pure IP network focused on telephony and broadband access for small-business customers. Cbeyond first implemented a softswitch-based network in March 2001, and thus far has deployed its services in Atlanta, Dallas, and Denver.

- **Nuvox.** A rapidly growing, facilities-based integrated communications provider, NuVox emerged from the union of Gabriel Communications and TriVergent. Serving 30 markets across the midwest and southeast, NuVox Communications offers businesses and other end users highly advanced integrated communications products and services. NuVox packages dedicated high-speed Internet access, Web design and hosting, and "traditional" local and long distance telephone services with unified voice, e-mail, and fax messaging as well as

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2 *In the Matter of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* Notice of Proposed Rulemaking, CC Docket No. 01-337 (rel. Dec. 20,2001) (NPRM or Notice).

advanced data services. NuVox also provides dial-up Internet services, data center services, and Customer Premise Equipment interconnects.

I. INTRODUCTION AND OVERVIEW

The Commission has sought comment on the best way to spur broadband deployment, and specifically, on whether deregulation of ILECs will achieve this goal. As Cbeyond and NuVox's comments will show, a direct correlation exists between ILEC spending on capital improvements and the competitive threat to ILEC operations posed by competitive CLECs. Because this correlation exists, the best way to spur broadband deployment is to enforce rigorously the Commission's existing rules implementing the Act.

Strong enforcement of the Commission's existing rules enables CLECs to obtain inputs, such as UNEs, that they need to provide broadband service in competition with the Regional Bell Operating Companies ("RBOCs" or "BOCs"). In contrast, any regulatory regime that would have the Commission abdicate its responsibilities and cease enforcing its rules will stop broadband deployment in its tracks. Such an approach, which seeks to replicate the end-result of the pending Tauzin-Dingell legislation through regulation (or in this case, purported "deregulation"), is not even permissible under the Act. Indeed, that the BOCs have aggressively sought legislative recourse in an attempt to achieve deregulation of their broadband services demonstrates that the regulatory result contemplated by the Commission is beyond the Commission's power to achieve.

ILECs still control the bottleneck inputs necessary for CLECs to provide broadband competition, and thus, still possess the market power and the means to make it difficult for CLECs to compete with them using these inputs. Existing law still requires ILECs to make these inputs available for use by their competitors. Wireline CLECs, such as the Joint Commenters, have invested billions of dollars in infrastructure and are fulfilling the Act's

promise of competition. Yet, despite the fine start these carriers, including the Joint Commenters, have made, their competitive inroads are not yet so significant as to threaten ILEC dominance of the broadband services markets.

Moreover, the Commission's exploration of premature deregulation, as it has in this proceeding, and in the recently released *Wireline Broadband NRPM*,[3] threatens to remove the Act's protections and undermine the progress these CLECs have made. If the deregulatory regime proposed by the Commission were to become law, it would place CLECs at an unfair and illegal competitive disadvantage, thereby removing the one factor — the threat of competition from wireline CLECs — that *is* spurring broadband deployment today.

The Commission also seeks comment on whether the promise of "intermodal" competition, that is, competition from providers that do not rely on inputs purchased from ILECs to provide broadband service, provides a sufficient check against ILEC dominance in the broadband market. However, intermodal competition to ILEC provision of broadband, especially in the small to medium sized business markets in which Cbeyond and NuVox compete, barely exists today, and is no substitute for dominant carrier regulation of ILEC-provided broadband. Indeed, cable and satellite providers are virtually non-existent in this market segment. In addition, the largest and most well-financed of the terrestrial wireless broadband providers that sought to serve these markets, and whose existence the Commission trumpeted in previous broadband reports, have either gone bankrupt or are on the brink of insolvency. These providers do not pose a sufficient competitive threat to ILEC dominance even

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[3] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, CC Docket No. 02-33, CC Dockets Nos. 95-20, 98-10 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*").

in the mass market where they hope to compete, let alone in the small-to-medium sized business market served by Cbeyond and NuVox.

The Commission's proposal for increasing broadband deployment -- deregulation, is a solution in search of a problem. The record demonstrates that the ILECs invested in new facilities when the competitive threat from CLECs was at its zenith, and reduced their capital spending when the threat waned. It is this competitive threat that incents broadband deployment, and not the presence or absence of allegedly burdensome regulations that, in any event, are mandated by the Act. Bell engineers invented DSL in 1989. They failed to deploy it not because of "burdensome regulations," but because to do so would cannibalize their other, more lucrative, product markets.[4]

The RBOCs such as SBC promise that they will roll out broadband services if the regulations that level the playing field for their competitors are removed. The RBOCs have made such promises in the past, and have failed to live up to them. And, if recent history is any guide, there is every reason to believe the RBOCs will fail to honor these promises in the future. If the Commission removes the competitive threat by relaxing the regulations that make it possible for CLECs to compete, it will remove the only incentive for ILECs to innovate. Should this occur, obtaining broadband service such as DSL will become as hard to get as an ISDN line was in 1995, before CLECs came on the scene and forced ILECs to respond to their competitive threat. The best way to ensure rollout of broadband services is for the Commission to *enforce its existing rules* implementing the Act. Failure to do so will ensure that broadband either is not deployed, or is only deployed at monopoly prices that make it unattractive to the vast majority of consumers.

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[4] Yochi J. Dreazen, Greg Ip, Nicholas Kulish, "Big Business, Why the Sudden Rise In the Urge to Merge And Form Oligopolies," Wall Street Journal, February 25, 2002, A1, at A10 (attached hereto as *Exhibit 1*).

Competition has repeatedly been demonstrated to be a more effective driver of new technologies than deregulation. As always, the problem with broadband delivery to end-users remains the last mile. All that is needed is for the Commission to enforce existing regulations to allow competitors access to UNEs that provide last mile connectivity. All we ask from the Commission is that it do its job as referee and enforce the laws Congress wrote to ensure a fair fight.

We also anticipate the ILECs will use this proceeding to try to make an end-run around Congress to implement Tauzin-Dingell. The Commission must not permit the ILECs to use this proceeding to circumvent the legislative process.

II. DEREGULATION AS PROPOSED BY THE COMMISSION CANNOT BE SQUARED WITH THE COMMUNICATIONS ACT'S REQUIREMENTS[5]

A. As the Commission Recently Recognized, The Communications Act Requires the FCC to Preserve Statutory Safeguards Designed to Promote Competition

The Commission has sought comment on whether the presence of Sections 251 and 252 of the Act provides a sufficient check on ILEC market power to enable the Commission to relax other requirements under Title II of the Act.[6] The Commission also has requested that commenters work to ensure that the Commission maintains a consistent regulatory framework between the several different rulemaking proceedings currently underway considering the regulatory treatment of common carriers that provide broadband service.[7]

At the same time it is seeking comment in this proceeding on whether Sections 251-252 of the Act may sufficiently check ILEC dominance to allow deregulation, it is

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5 To assist the Commission in prepation of its comment summary, each section of these comments contains a footnote listing the paragraphis in the Notice to which the comments respond. The comments contained in this section respond to Paragraphs 29-32 of the Commission's *NPRM*.

6 *NPRM* at ¶ 32.

7 *See, e.g. Wireline Broadband NPRM.*

considering in two other proceedings the core unbundling obligations with which ILECs today must comply. As demonstrated below, the only way to preserve and promote broadband competition is to continue enforcing *all* of the Commission's existing regulations designed to ensure that competitive carriers and ILECs may compete on a level playing field. This includes both the Commission's recently enacted rules on interconnection, collocation, and access to UNEs that are the subject of the Triennial Review proceeding[8], as well as non-discrimination and other requirements applicable to ILECs under Sections 201 and 202 of the Act that are the subject of this proceeding.

Moreover, Congress designed sections 251 and 252 of the Act to open up the local loop, the single wire that connects the end-user to the ILEC central office, to competition.[9] As such, the statute is designed to promote and achieve, and in fact, *requires*, *intra*modal competition. Accordingly, any suggestion that intermodal competition alone[10] is sufficient to declare ILECs nondominant is in conflict with this statutory scheme.

The Commission's rules implementing section 251 of the Act reflect this Congressional priority, and the Commission has repeatedly recognized the potential for ILECs to disadvantage their broadband rivals. A case in point is the Commission's Order authorizing the SBC-Ameritech merger. The Commission held that the merger would harm the public interest absent the imposition of conditions, the most important one of which – that the combined entity provide advanced services only through a separate affiliate – was later found unlawful, because

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8 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-339, NPRM (rel. Dec. 20, 2001).

9 *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and NPRM, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, RM 9244, 98-78, 98-91, 13 FCC Rcd 24011, 24023 (1998) (*Advanced Services Order*).

10 *See NPRM* at ¶ 31.

the separate affiliate would be too closely related to the original entities to pass muster under the Act.[11] The key holdings of that Order included the following:

> The merger will increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to the provision of advanced telecommunications services. This is likely to frustrate the Commission's ability to foster advanced services as it is directed to do by the 1996 Act.[12]
>
> . . . the record here is replete with assertions of discrimination against competing xDSL providers, and, . . discrimination against such providers has led to the Commission's actions in the *Advanced Services Rulemaking Proceeding*.[13]
>
> In the retail market for advanced services, *incumbent LECs can engage in discriminatory conduct with respect to competitors' provision of services such as xDSL by refusing to cooperate with competitors' requests for the evolving type of interconnection and access arrangements necessary to provide new types of advanced services.*[14]
>
> *We find that incumbent LECs* such as SBC and Ameritech *already have ample ability and incentive to discriminate against advanced services providers;* absent conditions, the increase in the incentive and ability to discriminate caused by the instant merger may frustrate substantially the realization of the 1996 Act's and the Commission's goals with respect to advanced services.[15]
>
> By capitalizing on its monopoly control over loops, . . . the combined entity can discriminate against an advanced services provider entering an area in the combined region. This will reduce the customer base and revenues of the advanced services provider, thereby reducing its ability to enter another region.[16]

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11 *See Association of Communications Enterprises v. FCC*, 233 F. 3d 662 (2001) ("*ASCENT v. FCC*").

12 *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712 (1999) at ¶ 5, *rev'd in part, Association of Communications Enterprises v. FCC*, 235 F. 3d 662 (2001).

13 *Id.* at ¶ 206.

14 *Id.* at ¶ 196 (emphasis supplied).

15 *Id.* at ¶ 201.

16 *Id.* at ¶ 208.

> . . . In this situation, . . . the increased incentive and ability for incumbents to discriminate against competing advanced services providers is such that a finding that there is no significant harm to competitors and consumers not only would undercut the Commission's ongoing efforts to encourage innovation and investment in advanced services, but runs afoul of the Commission's obligations under section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[17]
>
> We also reiterate that, with a continuing shift from a circuit-switched to a packet-switched environment, combined with non-incumbent competitors . . . using advanced services technologies to provide innovative new services, any discrimination against these competitors likely will cause a significant setback to current and future efforts to encourage competition and innovation.[18]
>
> Finally, we note that, with an increased incentive and ability to discriminate come increased costs of enforcement, which ultimately are borne by competitors and taxpayers.[19]

In the instant *NPRM*, the Commission seeks comment on the extent to which ILECs have the ability and incentive to use their market power in the local exchange and exchange access markets to unfairly disadvantage rival suppliers of broadband services.[20] The Commission has already recognized the ILECs' control over bottleneck elements that are needed to provide advanced services, and thus, the ILECs' ability to exercise market power in the market for advanced services, including but not limited to, xDSL. These Commission findings are as true today as they were when they were made. About the only change that has occurred since the findings detailed above were made is that scores of competitive carriers, including the high-profile competitive broadband providers such as, Covad, NorthPoint, and Rhythms NetConnections, which were mentioned prominently in the SBC-Ameritech Merger Order as broadband competitors to the proposed SBC-Ameritech combination, have gone out of business

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17 *Id.* at ¶ 210.

18 *Id.* at ¶ 210.

19 *Id.* at ¶ 210.

20 *NPRM* at ¶ 29.

entirely or drastically scaled back their operations. At the same time, as demonstrated below, BOCs such as SBC-Ameritech withheld promised broadband deployments from the market and reneged on promises to provide significant out-of-region competition. Now is hardly the time for the Commission to reverse course and conclude that competition is sufficiently established that these protections are no longer needed.

The point of the Commission's order authorizing the SBC-Ameritech merger was not that the two firms were incapable individually of disadvantaging broadband rivals, but rather that the combined firm would be able to disadvantage rivals more than either firm could on its own. Since the SBC-Ameritech Merger Order was released, change for the worse occurred as the DC Circuit invalidated a crucial safeguard – the separate affiliate requirement – in *ASCENT v. FCC*, leaving SBC's market power unchecked according to the FCC's findings. For the Commission to conclude now that ILECs no longer possess market power justifying dominant carrier regulation would be the essence of arbitrary and capricious agency action.

III. THIS PROCEEDING CANNOT SERVE AS A "BACK DOOR" TO THE BROADBAND DEREGULATION THAT THE RBOCS HAVE SOUGHT IN THEIR PROPOSED TAUZIN-DINGELL LEGISLATION[21]

In the NPRM, the Commission asks whether deregulation or reduced regulation would foster the deployment of broadband services and lead to increased broadband competition.[22] The Commission seeks comment on whether existing regulation inhibits or stimulates the deployment of broadband services,[23] and on whether there are "other regulatory requirements that [the Commission] should consider modifying or eliminating in the context of this proceeding."[24]

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21 This section of the comments responds to paragraphs 32-34 and 38-42 of the Commission's *NPRM*.

22 *NPRM* at ¶45.

23 *NPRM* at ¶46.

24 *NPRM* at ¶48.

Many of the issues on which the Commission seeks comment in the NPRM mirror proposed legislative findings contained in The Internet Freedom and Broadband Deployment Act, H.R. 1542 (the "Tauzin-Dingell Bill"). For instance, even though the Commission found that the pace of broadband deployment was adequate in its recent 706 Report, Section 2, "Findings and Purpose" of the Tauzin-Dingell Bill, states that:

> The imposition of regulations by the Federal Communications Commission and the states has impeded the rapid delivery of high speed Internet access service to the public, thereby reducing consumer choice and welfare.[25]
>
> . . . the Federal Communications Commission has construed the [Telecommunications Act of 1996] . . . in a manner that has impeded the development of advanced telecommunications services . . .[26]
>
> It is the purpose of this Act to provide market incentives for the rapid delivery of advanced telecommunications services by deregulating high speed data services . . .[27]
>
> . . . neither the Commission, nor any State, shall have authority to regulate the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data services or Internet access service, or to regulate the facilities used in the provision of either such service.[28]

The Joint Commenters are concerned that the deregulation proposed by the Commission seeks to accomplish the objectives of the Tauzin-Dingell Bill, while circumventing the legislative process. This proceeding, along with the Triennial Review proceeding and the Commission's recently-begun Wireline Broadband proceeding appear to be a tripartite attempt to achieve the goals of Tauzin-Dingell through regulatory means.

Expressly designed to overturn existing Commission broadband policies that allow competitors access to interconnection and UNEs used to provide broadband, the Tauzin-

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25 107th Cong. 1st Sess. H.R. 1542, at Section 2 (attached hereto as *Exhibit 2*).

26 *Id.*

27 *Id.*

Dingell Bill does not appear to have any chance of passage this year due to opposition to it in the United States Senate. The Joint Commenters caution the Commission that it should not seek to accomplish through regulation what could, as a matter of law, only be accomplished through legislation, and which is antithetical to the Commission's history of pro-competitive policies.

In the *NPRM*, the Commission also notes what it claims is "substantial investment" needed to build broadband networks, and asks whether regulation deters providers from deploying facilities.[29] At present, ILECs are the only carriers whose provision of broadband is regulated. And, the only regulations that exist concerning advanced services are those designed to combat that market power and level the playing field for competitors, as required by section 251 of the Communications Act. These regulations are many of the same ones that Tauzin-Dingell Bill targets for extinction. Recognizing that section 251 requires these market-opening measures, Tauzin-Dingell Bill seeks to do away with crucial interconnection and unbundling requirements as they relate to advanced services. This kind of naked attempt by well-financed, near-monopoly providers to disadvantage nascent competitors that are bringing new and innovative services to the public should not be tolerated in the Congress or before this Commission.

The Commission imposed regulation on the ILECs because it found them to have market power over loops and other inputs to broadband that could be used to disadvantage their competitors. The technology used by ILECs to provide broadband is xDSL, which can be deployed over existing copper wires. All that is needed to deploy such technologies are installation of DSLAMs, the purchase of DSL modems (which is often charged through to end-user customers), and, for non-ILECs, access to unbundled loops. The Joint Commenters are currently deploying xDSL and other broadband technologies with far fewer financial resources

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28 *Id.* at section 232.

than the ILECs, which earn billions of dollars in quarterly revenue. That the ILECs, which do not need to obtain interconnection or loops in order to provide these services, would need "help" from regulators prior to financing these network improvements simply defies common sense. The Commission should leave the consideration of Tauzin-Dingell Bill as a matter for Congress to decide, and should instead concern itself with implementing the Act that Congress already has charged it to enforce.

IV. RECENT EXPERIENCE DEMONSTRATES THAT COMPETITION—NOT DEREGULATION—IS THE MOST EFFECTIVE SPUR TO BROADBAND DEPLOYMENT[30]

The Commission's proposed deregulation is a solution in search of a problem. In its recently published *Broadband Report*, the Commission concludes that the pace of broadband deployment is adequate. In contrast, the only "evidence" that regulation is slowing the deployment of broadband is the BOCs' self-serving statements. As demonstrated below, past efforts to use deregulation to spur action by the BOCs have met with failure. Past reliance on the "honor system" of deregulation to incent deployment of facilities has resulted in nothing more than broken promises of action by the BOCs. In contrast, when regulators create an environment under which CLEC competition may flourish, BOCs have shown they can deploy facilities in response to the competitive threat.

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29 *NRPM* at ¶46.

30 This section of the comments responds to paragraphs 32-34 and 38-42 of the Commission's *NPRM*.

A. Patterns in ILEC Capital expenditures Demonstrate that Competition From CLECs Has Been the Most Powerful Stimulant to ILEC Broadband Deployment

1. Telecommunications Infrastructure Data Indicate that Increased Investments by Competitive Carriers in Local Facilities, including Broadband, Triggered Similar Increases in ILEC Investments as a Response to Competitive Threat.

Since the passage of the Telecommunications Act, competitive carriers have shown that they are willing to invest in local facilities, including broadband. Reports indicate, for example, that AT&T has invested over $4.5 billion in network infrastructure since 1999.[31] Indeed, the competitive CLEC industry as a whole invested $55.9 billion in local facilities from 1997 through 2000.[32] During this period, the BOCs also made significant investments in facilities in response to competitive threats. The BOCs' aggregate investment totaled $100 billion—22% higher than their investment during the four years preceding the passage of the Telecommunications Act.[33] This demonstrates that, when the ILECs perceive that there is competition from other carriers, they will aggressively invest in network facilities to match or exceed the deployment of competing carriers.

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31 *See Promoting Broadband Investment and Avoiding Monopoly*, White Paper written by Robert E. Hall and William H. Lehr (Feb. 21, 2002) (attached hereto as *Exhibit 3*).

32 *See State of Local Competition 2001*, Association for Local Telecommunications Services (ALTS), Feb. 2001 (attached hereto as *Exhibit 4*). CLECs' capital expenditures drew dramatically from $5 billion in 1997 to $9.2 billion in 1998, and $15.1 billion in 1999. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report and Order, CC Docket No. 98-146, FCC 00-290, at 77-78, ¶ 192 (rel. Aug.21, 2000) (*Broadband Report*).

33 According to FCC data, the BOCs invested $82 billion from 1992 to 1995 and $100 billion from 1997 to 2000. *See Telecommunications @ the Millenium*, Figure 10, Federal Communications Commission (Feb. 8, 2000) (BOC data for 1992-1999); *Statistics of Communications Carriers 2000/2001*, Table 2.7, Federal Communications Commission (Sept. 1, 2001) (BOC data for 2000).

2. History Shows that, Once the Competitors are Gone, the ILECs Retrench.

Conversely, network deployment data indicate that the ILECs significantly curtailed their network investments once it became apparent that competitive threats no longer existed.

Beginning in 2000, the telecommunications industry saw a significant number of competitive carriers file for Chapter 11 protection. Among those were NorthPoint Communications, Rhythms NetConnections, and Covad Communications—companies that directly competed with the BOCs in the provision of advanced data services.[34]

The BOCs' response was to cut their capital expenditures multiple-fold. For example, Verizon's target capital expenditure for 2002 is $15 to $16 billion—a significant reduction from the company's 2001 capital expenditure of $17.4 billion, and 2000 capital expenditure of $17.6 billion.[35] SBC's capital expenditure also shows a decreasing pattern—SBC's target capital expenditure for 2002 is $9.2 billion, compared to $11.2 billion in 2001 and $13.1 billion in 2000.[36] Qwest is no different. On January 29, 2002, Qwest announced that it was modifying its expected capital expenditures for 2002 to a range of $4.0 to $4.2 billion, from previous guidance of $4.2 billion to $4.3 billion.[37] Barely two weeks later, Joseph Nacchio, Qwest's Chairman and CEO, announced that Qwest would cut its capital expenditures further to $3.7 billion.[38]

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34 *See, e.g., Chapter 11 Isn't Always the End*, Network World (Nov. 5, 2001) (listing a sampling of telecommunications carriers that have filed for bankruptcy protection in 2001) (attached hereto as *Exhibit 5*).

35 *Verizon Communications Reports Solid Results for Fourth Quarter, Provide Outlook for 2002*, Verizon News Release (Jan. 31, 2002) (attached hereto as *Exhibit 6*).

36 *SBC Reports Fourth-Quarter Earnings*, SBC News Release (Jan. 24. 2002) (attached hereto as *Exhibit 7*); *see also* SBC Financial & Operating Statistics – Fourth Quarter Results, at www.ameritech.org.

37 *Qwest Communications Reports Fourth Quarter, Year-End 2001 Results*, Qwest Press Release (Jan. 29, 2002) (attached hereto as *Exhibit 8*).

38 *Qwest Sets Off Alarm Bells by Borrowing $4B from Banks*, TR Daily (Feb. 15, 2002) (attached hereto as *Exhibit 9*).

The following table demonstrates a pattern of capital expenditure reductions that the four BOCs have perpetrated as a group:

BOC	2000 CAPEX	2001 CAPEX	TARGET 2002 CAPEX
BellSouth	$6.99 billion	$5.99 billion	$4.8 to $5.0 billion[39]
Qwest	$8.99 billion	$8.54 billion	$3.7 billion[40]
SBC Ameritech	$13.1 billion	$11.2 billion	$9.2 billion to $9.7 billion[41]
Verizon	$17.6 billion	$17.4 billion	$15 to $16 billion[42]

This pattern of capex reductions shows that there is a direct relationship between the near-decimation of competition from the data-CLECs and the ILECs' capex: the less competition there is, the less money the ILECs are willing to invest in new network facilities. Notably, a published analysis by Banc of America Securities posits that the ILECs are no longer eager to spur advanced services deployment as they once were:

> [T]he ILECs are arguably more secure in their local franchise monopolies today than they have been in a decade. That's because the presumed threats to their local business have eroded rapidly over the past several months—long distance providers are struggling with deteriorating business and the CLECs are going through a painful shake-out that may leave few standing. There is a re-monopolization of the local phone business underway. As a

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39 *BellSouth Reports Fourth Quarter Earnings*, BellSouth Press Release (Jan. 22, 2002) (attached hereto as *Exhibit 10*). *See also* BellSouth Consolidated Statements of Income – Fourth Quarter 2001, at www.bellsouth.com. BellSouth's initial target capital expenditure for 2002 was $$5.3 to $5.5 billion, which it later further reduced by $500 million. *BellSouth Updates 2002 Financial Guidance*, BellSouth Press Release (Feb. 21, 2002) (attached hereto as *Exhibit 11*).

40 *Qwest Communications Reports Fourth Quarter, Year-End 2001 Results*, Qwest Press Release (Jan. 29, 2002) (*see Exhibit 8*); *Qwest Sets Off Alarm Bells by Borrowing $4B from Banks*, TR Daily (Feb. 15, 2002) (*see Exhibit 9*).

41 *SBC Reports Fourth Quarter Earnings*, SBC News Release (Jan. 24, 2002) (*see Exhibit 7*); *see also* SBC Financial & Operating Statistics – Fourth Quarter Results, at www.ameritech.org.

42 *Verizon Communications Reports Solid Results for Fourth Quarter, Provide Outlook for 2002*, Verizon News Release (Jan. 31, 2002) (*see Exhibit 6*).

result, we think the ILECs may feel less pressure to aggressively pursue any costly new revenue streams, including DSL.[43]

B. Consistent Commission Findings and Past ILEC Behavior Demonstrate that Competition is the Most Powerful Stimulant to Broadband Deployment

1. The Commission Has Consistently Found that Competition Promotes Broadband Deployment

One of the core goals of the Telecommunications Act of 1996 was to achieve deregulation by promoting competition. In contrast, to allow deregulation while meaningful competition does not yet exist merely allows unconstrained exercise of market power, a result which is antithetical to the statutory scheme Congress created as well as the Commission's entire reason for existence. The entire history of the Commission's implementation of the 1996 Act demonstrates the Commission's efforts to promote competition through carefully crafted regulation that enables competitive carriers to obtain the benefits of the statutory scheme Congress created.

The Commission should avoid pursuing deregulation for its own sake. Instead, as it has in the past, the Commission should use carefully crafted regulations to allow competition to thrive. The Commission has repeatedly stated that competition is the best driver of innovation and lower prices for consumers, and Congress also recognized its importance in the 1996 Act. Indeed, Section 706 itself states that "the Commission...shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing... *measures that promote competition* in the local telecommunications market, or *other*

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[43] *Reassessing the Profitability of High-Speed Data*, Banc of America Securities (May 7, 2001) (attached hereto as *Exhibit 12*).